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# United States v. Salvucci: The Problematic Absence of Automatic Standing

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# *United States v. Salvucci*: The Problematic Absence of Automatic Standing

*The United States Supreme Court recently abolished the automatic standing rule in United States v. Salvucci. The author analyzes the difficulties created for the criminal defendant charged with a possessory crime. In particular, this note focuses on the inequitable position the defendant is placed in when his suppression hearing testimony is used as a tool to impeach subsequent testimony offered at trial. The author continues by pointing out that the "prosecutorial self-contradiction," sought to be abolished in Salvucci, remains a part of our present judicial system. In conclusion, the author offers several considerations that will necessarily be an integral part of any future decision regarding the impeachment use of suppression hearing testimony.*

## I. INTRODUCTION

In 1960, the United States Supreme Court created an exception to the standing requirements for challenging possible violations of the fourth amendment.[1] In *Jones v. United States*,[2] the Court cre-

1. One of the most difficult constitutional questions arises when one fundamental right is judicially treated so as to infringe upon another. The fourth and fifth amendments are often the elements of such a conflict. They are, by nature, both evidentiary. The fourth amendment was designed to protect individuals from unreasonable searches and seizures. The fifth amendment provides an individual with protection against self-incrimination. However, in order to be able to invoke protection under the fourth amendment, a criminal defendant must establish fourth amendment "standing." This is established at a pretrial suppression hearing by the defendant's testimony that he had an adequate interest in the premises searched or the item seized. *See* W. RINGEL, SEARCHES & SEIZURES, ARRESTS & CONFESSIONS § 20.5 (2d ed. 1979). When such testimony is self-incriminating, there arises the situation where the defendant's fifth amendment right against self-incrimination is being sacrificed in order to secure his fourth amendment rights. This conflict is not infrequent. *See* 4 J. WIGMORE, EVIDENCE § 1066 (3d ed. 1940).

Standing requirements were developed to limit the application of the exclusionary rule to only those who have been "victims" of illegal search or seizure. *See, e.g.*, Agnello v. United States, 269 U.S. 20 (1925). In that case, the Court reversed the conviction of a defendant whose house had been illegally searched, but affirmed the conviction of his co-defendants. This illustrates the Court's concern in overextending the applicability of the exclusionary rule. By denying the availability of the rule to the co-defendants, the Court restricts its use to those who have truly been "victims."

The interest required in order to obtain standing in fourth amendment challenges has been adjusted several times by the courts. *See* Gaskins v. United States, 218 F.2d 47 (D.C. Cir. 1955) (a defendant was denied the opportunity to assert her fourth amendment rights because she was merely a "guest" at the time of the illegal search). Actual ownership of the house searched was required in Gibson v. United States, 419 F.2d 381 (D.C. Cir. 1945). The Court found that such fourth amendment protection did not extend to "co-defendants." A "visitor" has

ated the "automatic standing rule"[3] a device through which a criminal defendant, charged with a possessory crime,[4] could challenge the legality of a search and seizure without regard to whether he had a sufficient interest in the premises searched or the items seized. The automatic standing rule was limited to possessory crimes due to the peculiar problem which such crimes represent. Stated simply, in crimes involving the illegal possession of an item, standing to object to the admission of the item as evidence at trial may be obtained only by establishing an interest in the item. Normally, this interest is established at a pre-trial hearing on the suppression of such evidence where the defendant testifies that he did, indeed, possess the item in question. This same possession is the element that the state must prove in order to convict the defendant of the possessory crime. Consequently, the defendant's testimony of possession at the suppression hearing actually constitutes an admission of guilt.[5]

Automatic standing solved a further dilemma known as "prosecutorial self-contradiction."[6] "Prosecutorial self-contradiction" occurs when the state attempts to take advantage of a conflicting predicament. The government asserts that the defendant possessed the item for purposes of criminal liability, while simultaneously asserting that he did *not* possess the item for standing purposes. The *Jones* Court noted that the "prosecution . . . sub-

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also been denied the use of the fourth amendment protection in *In re* Nassetta, 125 F.2d 924 (2d Cir. 1942). And finally, another example of this evolution in the standing requirements is illustrated by Jones v. United States, 262 F.2d 234 (D.C. Cir. 1958) (the defendant was required to show an infringement of his personal rights).

Employees, while in "control" or "occupancy" have been determined to lack the requisite possessory interest in the item seized. *See* Connolly v. Medalie, 58 F.2d 629 (2d Cir. 1932). The necessary quantum of interest has been distinguished as being "ownership in or right to possession of the premises," *see, e.g.*, Jeffers v. United States, 187 F.2d 496, 501 (D.C. Cir. 1950), *aff'd*, 342 U.S. 48 (1951).

2. 362 U.S. 257 (1960).

3. This phrase was coined in the *Jones* case. *Id.* The title of the rule is literal. A criminal defendant in this situation is given standing to suppress evidence "automatically." The practical effect of this rule is to eliminate the need for any potentially incriminating testimony at the suppression hearing. The defendant may proceed to establish the illegality of any evidence that may have been obtained through an unlawful search or seizure.

4. A possessory crime is one in which the very *possession* of an item or contraband is the basis for conviction. The illegal possession of narcotics is one example.

5. This is precisely the "dilemma" that was described in *Jones*.

6. As this term connotes, the prosecution contradicts itself by both granting and denying possession to the same defendant, in the same case. Possession both convicts and confers standing. The Court in *Jones* explained that it would not be "consonant with the amenities, to put it mildly, of the administration of criminal justice to sanction such squarely contradictory assertions of power by the Government." 362 U.S. at 263-64.

jected the defendant to the penalties meted out to one in lawless possession while refusing him the remedies designed for one in that situation."[7]

The automatic standing rule had the effect of eliminating all suppression hearing testimony by the defendant. It provided that the defendant never had to testify prior to trial concerning his interest in the item or premises. This completely eliminated any possibility of "prosecutorial self-contradiction" when dealing with possessory crimes. Fifth amendment rights[8] were correspondingly protected by preventing the incriminating use of suppression hearing testimony simply because no suppression hearing testimony was required or given. Not only did this rule exclude the use of prior testimony for purposes of establishing guilt at trial, it also eliminated the use of such testimony for impeachment purposes at trial.[9]

In 1968, the Supreme Court again addressed the standing issue in a case which did not involve a possessory crime. In *Simmons v. United States*[10] the Court held that "when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial."[11] Because of the nature of the crime charged, the defendant in *Simmons* was not eligible to invoke the automatic standing rule of *Jones*.[12] The Court's holding in *Simmons* elimi-

7. 362 U.S. at 263.

8. Fifth amendment rights against self-incrimination are logically protected because no testimony is required under the automatic standing rule. The Court in Simmons v. United States, 390 U.S. 377 (1968), held that it would be "intolerable that one constitutional right should have to be surrendered in order to assert another." *Id.* at 394.

9. By never having to establish standing, the possessory criminal defendant never has to offer testimony at a suppression hearing. The first time the defendant takes the stand is at trial to establish that he never possessed the item. Without the automatic standing rule, this testimony will most likely be contrary to that given at a suppression hearing. The prosecution, under such circumstances, would then be able to impeach the latter testimony due to the inconsistencies. For a thorough discussion on impeachment, *see* 2 WHARTON'S CRIMINAL EVIDENCE § 469 (13th ed. C. Torcia 1972).

10. 390 U.S. 377 (1968).

11. *Id.* at 394.

12. The defendant, Garrett, justifiably proceeded on the assumption that the standing requirement had to be satisfied. He, therefore, offered incriminating testimony. It has been suggested that the adoption of the "police-deterrent" rationale for the exclusionary rule would logically dictate that a defendant should be able to object to the admission against him of *any* unconstitutionally seized evidence. *See* Linkletter v. Walker, 381 U.S. 618, 636 (1965); *see* Comment, *Standing to Object to an Unreasonable Search and Seizure*, 34 U. CHI. L. REV. 342 (1967); Note, *Stand-*

nated the prejudicial use of suppression hearing testimony for many purposes.[13] An essential issue, however, was ignored in this decision: would *Simmons* allow the use of suppression hearing testimony for *impeachment* purposes? Ever since *Simmons*, courts have wrestled with the notion that perhaps the *Simmons* case rendered *Jones* and the automatic standing rule obsolete by eliminating the "dilemma."[14] The impeachment issue continued to be ignored, at least by the Supreme Court,[15] until it was addressed, though not laid to rest, in June of 1980 when the Supreme Court decided that the *Jones* doctrine was unnecessary.

In *United States v. Salvucci*,[16] the Court held that the automatic standing rule had "outlived its usefulness in Fourth Amendment jurisprudence."[17] As for the impeachment issue, the majority considered it more appropriate to reserve their decision on that matter until they were presented with a case specifically dealing with the "breadth of the *Simmon*'s privilege, and not with the need for retaining the automatic standing [rule]."[18]

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*ing to Object to an Unlawful Search and Seizure*, 1965 WASH. U.L.Q. 488. However, this argument to abolish the standing requirement altogether was not advanced in the *Jones* or *Simmons* cases.

13. At least one set of authors has advanced the notion that had the *Jones* Court originally adopted a *Simmons*-type prohibition against subsequent use of suppression hearing testimony, the result would have ultimately been more beneficial for the judicial system. *See* Trager and Lobenfeld, *The Law of Standing Under the Fourth Amendment*, 41 BROOKLYN L. REV. 421 (1975). It is suggested that the *Jones* Court had two alternatives:

> It could have adopted an automatic standing rule, as was done, with the consequence that standing would sometimes be granted to defendants who were not victims of fourth amendment violations, or, alternatively it could have foreclosed the Government from using any testimony given by a defendant at a suppression hearing on the issue of guilt.

*Id.* at 428. The latter alternative would create a distinction between successful and unsuccessful suppression hearing motions.

14. The appellate court that reviewed the case that is the subject of this casenote observed that the vitality of the *Jones* doctrine had been challenged in recent years, but that "[u]ntil the Supreme Court rules on this question, we are not prepared to hold that the automatic standing rule of Jones has been . . . overruled. . . . That is an issue which the Supreme Court must resolve." United States v. Salvucci, 599 F.2d 1094, 1098 (1st Cir. 1979). *See, e.g.*, Brown v. United States, 411 U.S. 223, 228 (1973).

15. Although the issue of impeachment was ignored by the Supreme Court, there have been a number of courts that have held such testimony admissible as evidence for impeachment of subsequent testimony. People v. Douglas, 66 Cal. App. 3d 998, 136 Cal. Rptr. 358 (1977); People v. Sturgis, 58 Ill. 2d 211, 317 N.E.2d 545 (1974); Gray v. State, 43 Md. App. 238, 403 A.2d 853 (1979). The most significant of these is Woody v. United States, 379 F.2d 130, 131-32 (D.C. Cir. 1967) (Burger, J.), *cert. denied*, 389 U.S. 961 (1967). *But see* Cannito v. Sigler, 321 F. Supp. 798 (D. Nebr. 1971) *rev'd* 449 F.2d 542 (8th Cir. 1971), *cert. denied*, 407 U.S. 912 (1972) (court held that tangible evidence which had been suppressed as the subject of an illegal search and seizure could not be used to impeach testimony by the defendant).

16. 100 S. Ct. 2547 (1980).

17. *Id.* at 2554.

18. *Id.* The respondents attempted to show the continued existence of the

This article examines the history of this judicially created rule, its present status, and the factors which the Court eventually must consider in order to make a decision regarding the use of suppression hearing testimony for impeachment purposes.

## II. HISTORICAL PERSPECTIVE

*Jones, Simmons,* and *Salvucci* deal with the issue of standing as it relates to the ability to invoke the exclusionary rule.[19] The judicially created exclusionary rule basically stands for the proposition that evidence obtained by violating the defendant's constitutional rights may not be introduced by the prosecution. Two theories have been offered concerning the rationale behind the rule. First, such exclusion will act as a deterrent to violations of the Constitution, since in many cases the police will have no motive to conduct an unlawful search if they know that they will not be able to use its fruits as evidence.[20] Secondly, the integrity of the judicial system requires that the courts are not made parties to "lawless invasions of the constitutional rights of citizens by

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*Jones* dilemma by showing the risks that were taken in order to obtain their fourth amendment rights. The Court was obviously not convinced. *See* note 62 *infra*, and accompanying text.

19. Language in Boyd v. United States, 116 U.S. 616 (1886) suggested for the first time that evidence obtained in violation of fourth amendment rights should be inadmissible in court. The exclusionary rule saw its origin in Weeks v. United States, 232 U.S. 383 (1914), where the Court held that such exclusions of illegally obtained evidence should be the law. The rule makes any evidence that is obtained in violation of the Constitution, statutes, or court rules completely inadmissible in a court of law. The United States Supreme Court currently enforces an exclusionary rule in state and federal criminal proceedings as to four major types of violations: searches and seizures that violate the fourth amendment, Mapp v. Ohio, 367 U.S. 643 (1961); confessions obtained in violation of the fifth and sixth amendments, Miranda v. Arizona, 384 U.S. 436 (1966); identification testimony obtained in violation of the fifth and sixth amendments, United States v. Wade, 388 U.S. 218 (1967); and evidence obtained by methods so shocking that its use would violate the due process clause, Rochin v. California, 342 U.S. 165 (1952). The exclusionary rule is the Supreme Court's sole means for enforcing these vital constitutional rights. The sentiment of the Court toward these rights is best expressed by the language in *Weeks*, wherein the Court said that "[t]o sanction such proceedings would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action." 232 U.S. at 394.

20. In Terry v. State of Ohio, 392 U.S. 1 (1968), the Court stated that the exclusionary rule's "major thrust is a deterrent one and experience has taught that it is the only effective deterrent to police misconduct in the criminal context, and that without it the constitutional guarantee against unreasonable searches and seizures would be a mere 'form of words.'" 392 U.S. at 12. *See, e.g.*, Linkletter v. Walker, 381 U.S. 618, 629-35 (1965); Mapp v. Ohio, 367 U.S. 643, 655 (1961).

permitting unhindered governmental use of the fruits of such invasions."[21]

Although the validity and efficacy of the exclusionary rule is not at issue here, it is worth noting that the exclusionary rule has been the subject of many controversial debates.[22] For our purposes, we need only recognize and accept its present status as the law of our judicial system.[23] As such, it must be dealt with and observed, and any withdrawal from its use must be done in an orderly, logical, and lawful manner. To ignore the rule's authority and to proceed inconsistently with other judicial precedents is to create the very "prosecutorial self-contradiction" that the rule was designed to eliminate.

The text of the fourth amendment contains no limitation on its availability to the criminal defendant. The Supreme Court has, however, developed certain standing requirements that act to restrict fourth amendment application. In 1925, the Supreme Court placed a limitation on fourth amendment availability by holding in *Agnello v. United States*[24] that its application would be restricted to those defendants who had "standing." In other words, fourth amendment protection extended only to those who had been "victims" of illegal searches or seizures.[25]

The introduction of a standing requirement was the beginning of a period during which many different applications were developed. Different jurisdictions created their own versions of stand-

21. 392 U.S. at 13.

22. *See* Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970). This provides an exhaustive study of the success of the rule. Oaks concludes that, "[a]s a device for directly deterring illegal searches and seizures by the police, the exclusionary rule is a failure." *Id.*, at 755.

23. The Supreme Court alluded to the possibility that perhaps the admission of illegally secured evidence was violative of the constitutional guarantees in Weeks v. United States, 232 U.S. 383 (1914). The Court adopted the rule and it has remained with our criminal judicial system ever since.

24. 269 U.S. 20 (1925).

25. In *Jones v. United States*, the Court held that ordinarily "it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he . . . establish, that he himself was the victim of an invasion of privacy." 362 U.S. at 261. This notion of standing is not at odds with the automatic standing rule, as demonstrated by the *Jones* majority—the authors of automatic standing. It is the method of obtaining this fourth amendment standing that has caused problems in the past. The procedure prior to the *Jones* decision required the defendant to testify in order to establish an interest in the illegally obtained evidence. This, alone, is not objectionable for it is a rational means of limiting the availability of the exclusionary rule to those who are truly "victims" of the illegal search and seizure. The objectionable aspect of this requirement is the fact that this testimony (given in order to obtain the fourth amendment right) is available for subsequent use that may be quite incriminating to the defendant. This inequitable situation prompted the *Jones* decision. For a complete discussion on suppression hearing standing, *see* 1 CRIMINAL DEFENSE TECHNIQUES § 4.19 (R. Cipes ed. 1969 & M. Eisenstein ed. Supp. 1979).

ing.[26] This inconsistency recently prompted the United States Court of Appeals for the Third Circuit to observe that "the problem of standing in Fourth Amendment cases has for a considerable period of years been troublesome to courts and commentators."[27]

Rule 41(e) of the Federal Rules of Criminal Procedure offered little assistance in defining the ambiguities and inconsistencies that prevailed. It reads in part:

> A person aggrieved by an unlawful search and seizure may move . . . for the return of . . . property . . . illegally sezied. . . . If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial.[28]

In *Jones*, Justice Frankfurter stated that Rule 41(e) "applies the general principle that a party will not be heard to claim a constitutional protection unless he 'belongs to the class for whose sake the constitutional protection is given.' "[29] He further stated that a defendant attempting to challenge evidence against himself on

26. The variety and disparity among the different standing requirements is illustrated by the following cases. In Nunes v. United States, 23 F.2d 905 (1st Cir. 1928), the court held that a showing that the premises searched were the defendant's dwelling place was required. The fact that the defendant had failed to show that he owned the contraband seized was also fatal to the defendant's cause. United States v. Messina, 36 F.2d 699 (2d Cir. 1929) held that because the casual workman was not an owner of the premises or a tenant, employee or guest dwelling therein, he lacked the requisite interest to object to any search made of the premises. A similar holding is found in Chepo v. United States, 46 F.2d 70 (3d Cir. 1930) where the court held that because the defendant had disclaimed interest in a portion of the premises searched, he could not attack the search. Still another interpretation was presented in Chicco v. United States, 284 F. 434 (4th Cir. 1922). There, the court found that because the defendant was not the actual owner of the premises, he could not object to the seizure of any contraband. While these cases all deal with a certain interest requirement, the *degree* of interest is not defined in any of them. One case requires actual ownership while another requires merely an interest in the premises searched or item seized. Such ambiguity is likely to produce varying results concerning a basic fundamental right.

27. United States v. West, 453 F.2d 1351, 1353 (3d Cir. 1972). The question of standing is inextricably bound to the philosophical basis of the application of the exclusionary rule as a means of enforcing the fourth amendment. If the primary purpose of the rule is, as the Supreme Court announced in Linkletter v. Walker, 381 U.S. 618 (1965), deterrence of illegal police conduct, then perhaps the goal would be best achieved by easing the standing requirements. *See* Comment, *Standing to Object to an Unreasonable Search and Seizure*, 34 U. CHI. L. REV. 342 (1967).

28. FED. R. CRIM. P. 41(e).

29. 362 U.S. at 261 (quoting Hatch v. Reardon, 204 U.S. 152, 160 (1907)). Rule 41(e) did little to clear up the confusion in this area of the law. At most, it introduced the term "a person aggrieved" with which the courts could guide their decisions. However, as is evidenced by *Reardon*, the courts merely incorporated the legislative language into their own existing standards.

fourth amendment grounds had to be "one against whom the search was directed."[30] The Court's language evidenced an attempt to define the inherently ambiguous term "person aggrieved."

Aside from the confusion and uncertainty that prevailed in this area, there arose an even greater difficulty. The problem existed in the peculiar context of possessory crimes. In order to establish the aforementioned standing, a defendant charged with a possessory crime had to testify that he had an interest[31] in the property seized or in the premises searched.[32] Consequently, a defendant seeking to comply with what had become the conventional standing requirement, was "forced to allege facts the proof of which would tend, if indeed not be sufficient, to convict him."[33] Judge Learned Hand spoke of this "dilemma" in *Connolly v. Medalie*.[34]

> Men may wince at admitting that they were the owners, or in possession, of contraband property; may wish at once to secure the remedies of a possessor, and avoid the perils of the part; but equivocation will not serve. If they come as victims, they must take on that role, with enough detail to cast them without question. The petitioners at bar shrank from that predicament; but they were obliged to choose one horn of the dilemma.[35]

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30. 362 U.S. at 261. This is known as the "target theory" of standing. As the term suggests, standing was conferred upon the party against whom the search was targeted. This theory required a finding by the court, based upon warrant affidavits and police testimony, of the precise party against whom the search was designed.

This theory, however, was subsequently rejected in Rakas v. Illinois, 439 U.S. 128 (1978). Mr. Justice Rehnquist, writing for the majority, held that the "so-called 'target' theory . . . would in effect permit a defendant to assert that a violation of the Fourth Amendment rights of a third party entitled him to have evidence suppressed at his trial." 439 U.S. at 133. In view of the reluctance that the Court has to extend standing, such a rejection of the target theory is understandable. *See* note 32 *infra*.

31. *See* note 4 *supra*.

32. 362 U.S. at 261. The Court said that in order "[t]o establish 'standing', Courts of Appeals have generally required that the movant claim . . . to have had a substantial possessory interest in the premises searched." *Id.* The Court then gave an example using narcotics as the possessed item. Since the indictment and conviction both would be established by proving that the defendant possessed the narcotics, anything the defendant said to establish his possession, according to the standing requirements, would aid the prosecution in their case.

33. 362 U.S. at 262. The Court presents the notion that requiring the defendant to assert possession in a trial where he will be trying to deny possession, operates to encourage the defendant to perjure himself if he seeks to establish 'standing' while maintaining a defense to the charge of possession." *Id.*

34. 58 F.2d 629 (2d Cir. 1932). In *Connolly*, a night watchman was arrested pursuant to the National Prohibition Act for being present when police officers raided a brewery. They had no search warrant and no probable cause to search without one. The night watchman was held not to be a "person aggrieved" under the Rules of Criminal Procedure. For a general discussion on the parameters of standing under Rule 41(e), *see* 5 L. ORFIELD, CRIMINAL PROCEDURE UNDER THE FEDERAL RULES § 41:52 (1967).

35. 58 F.2d at 630. The language presented here indicates an intolerance on the Court's part toward defendants who refuse to establish their standing in fear

By definition, a possessory crime is one in which the government is asserting possession on the part of the defendant. In cases "where the indictment itself charges possession, the defendant in a very real sense is revealed as a 'person aggrieved by an unlawful search and seizure' upon a motion to suppress evidence prior to trial."[36] "Prosecutorial self-contradiction" results under these circumstances: the defendant is told that his possession was illegal while also being told that he did not possess the illegal item for standing purposes.

In 1960, the Supreme Court sought to remedy this situation with their decision in *Jones v. United States*.[37] The Court in that case held that a defendant had "automatic standing"[38] to challenge the legality of the search. The Court noted that "to hold to the contrary . . . would be to permit the Government to have the advantage of contradictory positions as a basis for conviction."[39]

The effect of the automatic standing rule was to completely eliminate any possibility of using suppression hearing testimony at trial, simply because there was never any suppression hearing testimony to use. Immediately upon being indicted for a possessory offense, the defendant became a "person aggrieved" under Rule 41(e). The *Jones* rule, however, only applied to possessory crimes, leaving future conflicts[40] involving other types of crimes

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of incriminating themselves. This, again, suggests the idea of one constitutional right being employed at the expense of another.

36. 362 U.S. at 264. Regardless of the defendant's interest in the premises or item, when one is being charged with the possession of an illegal item, he is definitely a "person aggrieved" in the sense that the statute is operating against him. When an illegal search occurs and evidence is consequently produced, who else is aggrieved by such a search if not the person who is being indicted and convicted because of it?

37. 362 U.S. 257 (1960). In *Jones*, the defendant was present in an apartment that was rented by a friend who permitted him to use it. He moved to suppress evidence that was seized from that apartment on the ground that the search was illegal.

38. *See* note 3 *supra*.

39. 362 U.S. at 263. The Court's rationale on this point is quite clear. The defendant's conviction is a result of his possession at the time of the search and yet the contraband was admitted into evidence on the ground that the defendant did not have possession of the narcotics at that time. To base a conviction on such a contradiction would be ridiculous.

40. The future conflicts mentioned here could involve any evidence that was illegally obtained in crimes that do not involve possession. In the case of a murder, the most significant piece of evidence, a weapon, could be obtained through a violation of the defendant's fourth amendment rights. In order to object to the introduction of such evidence, the defendant has to establish an interest in the weapon that might well lead to his conviction. The *Jones* automatic standing did

open to possibility. Such a conflict was presented in *Simmons v. United States*.[41]

In *Simmons*, because the defendant was not charged with a possessory crime, he was required to establish standing to challenge the seized evidence.[42] At the suppression hearing he accordingly testified that a suitcase containing incriminating evidence of a bank robbery was his.[43] The Court observed that "[w]ithout his testimony, the Government might have found it hard to prove that he was the owner of the suitcase."[44] The Court seemed even more impressed by the fact that if the motion was unsuccessful, a defendant would be "assuming the risk that the testimony would later be admitted against him at trial."[45] The Court continued, "[i]n these circumstances, we find it intolerable that one constitutional right should have to be surrendered in order to assert another. We therefore hold that when a defendant testifies in support of a motion to suppress evidence . . . his testimony may not thereafter be admitted against him at trial. . . ."[46]

The *Simmons* ruling effectively resolved the problem presented to the Court. Its scope seemed to adequately eliminate the dilemma that was recognized by the *Jones* court. It appeared as though everything the automatic standing rule did, the Simmons decision could do, and do better. Better, because its application was not narrowly defined. *Jones* applied only to possessory crimes whereas *Simmons* was available to all criminal defendants. The criminal defendant could now freely testify in a pretrial suppression hearing without the threat of having that testimony used against him at trial. However, there remained unanswered a very important question: while suppression hearing testimony was generally made unavailable to the prosecution, would it also apply to the use of such testimony for impeachment purposes?[47]

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not preclude such an incident from occurring, since the *Jones* rule only applied to possessory crimes, and murder is not a possessory crime.

41. 390 U.S. 377 (1968).

42. *Id.* at 390. The defendant in *Simmons* justifiably proceeded on the assumption that he had to satisfy the traditional standing requirement, that of establishing an interest in the item seized. By doing so, however, he was incriminating himself in a very real sense. *See* note 52 *infra*.

43. 390 U.S. at 391.

44. *Id.* The government concedes that there were no identifying marks on the outside of the suitcase. 390 U.S. at 391 n.14.

45. *Id.* at 391. Such a situation was "highly prejudicial," and was not tolerated. Although the Court had provided in *Jones* that evidence thus obtained in a possessory crime was unlawful, there appears to be no logical distinction between the prejudicial situations presented by the *Jones* and *Simmons* case. Therefore, the conclusions are consistent and the outcomes equally protective of fourth and fifth amendment rights.

46. *Id.* at 394.

47. At this stage it is well to look at *Jones* and *Simmons* in juxtaposition and

The automatic standing rule had precluded any such use. By not requiring suppression hearing testimony in order to establish fourth amendment standing, there was never any testimony given with which the prosecution could impeach subsequent testimony. The *Simmons* ruling, however, resurrected the suppression hearing testimony requirement and left the prosecution free to use such testimony for impeachment purposes.

Subsequent cases reflected the uncertainty as to the continued validity of the *Jones* automatic standing rule; however, no court was willing to hold that *Jones* was no longer valid.[48] Even the Supreme Court passed up an opportunity to abolish the automatic standing rule. In *Brown v. United States*,[49] the Court limited the dimensions of the automatic standing rule to fact patterns similar to *Jones*, those in which possession "at the time

see how their holdings interrelate. The most obvious distinction is the application of the two decisions. *Jones* very narrowly applies to possessory crimes whereas *Simmons* applies to all crimes. The question most commonly presented about the two was whether *Simmons* overruled *Jones*. *See* note 54 *infra*. The obvious alternative was that the two rules coexisted in equal importance and necessity.

Consider the cases of two defendants A and B. A is indicted on the charges of illegal possession of narcotics, a possessory crime. Under the *Jones* rule, he is not required to offer any testimony in order to obtain standing to object to any evidence. Therefore, there is no testimony to use at trial for *any* purposes. Under *Simmons*, however, the same defendant is required to testify. While this testimony may not be used at trial, the testimony is valuable for other purposes. *See* note 68 *infra*. B, on the other hand, is indicted on a nonpossessory crime. Under *Simmons*, he is affected much like A is, but in the case of nonpossessory crime, there is little reason for the defendant to take the stand at trial. For possessory crimes it is essential to take the stand and testify in order to establish nonpossession. When A does so, his subsequent testimony will be impeached by the prior testimony.

The question this raises is clear. Why couldn't *Jones* and *Simmons* coexist in our judicial system in order to grant the full spectrum of protection for both possessory and nonpossessory crimes? There is nothing in one case that contradicts the other as far as standing is concerned.

48. *See, e.g.*, United States v. Hearn, 496 F.2d 236 (6th Cir. 1974); United States v. Smith, 495 F.2d 668 (10th Cir. 1974); United States v. Groner, 494 F.2d 499 (5th Cir. 1974); United States v. Cotham, 363 F. Supp. 851, (W.D. Tex. 1973).

49. 411 U.S. 223 (1973). It is not clear why the Court has been so dissatisfied with the *Jones* automatic standing rule. In *Brown*, the Court expressed a discomfort with its continued validity but refused to overrule it. 411 U.S. at 228. The reasoning, in view of the subsequent use of testimony for impeachment purposes, is fallacious. This becomes apparent with the Court's language in *Brown*. "[W]e do not decide that this vice of prosecutional self-contradiction warrants the continued survival of *Jones*' 'automatic' standing now that our decision in *Simpson* has removed the danger of coerced self-incrimination. We simply see no reason to afford such 'automatic' standing where, as here, there was no risk to a defendant of either self-incrimination or prosecutorial self-contradiction." 411 U.S. at 229. Such coerced self-incrimination has not been removed entirely. *See* note 76, *infra*.

of the contested search and seizure is 'an essential element of the offense . . . charged.' "[50] Chief Justice Burger went on to say that the Court was not ready to decide whether or not the "vice of prosecutorial self-contradiction warrants the continued survival of the *Jones* 'automatic standing' now that our decision in *Simmons* has removed the danger of coerced self-incrimination."[51] Reflected in this statement is the general feeling that *Simmons* had rendered *Jones* obsolete.

It was not until June 25, 1980 that the Supreme Court decided that the *Jones* doctrine was, indeed, dead. In *United States v. Salvucci*, the respondents were charged with unlawful possession of stolen mail, a possessory crime that fell within the narrow application of the *Jones* rule as defined by *Brown*. The court of appeals affirmed the district court's finding that since the crime was possessory in nature, the defendants were not required to establish standing in order to challenge the illegally seized evidence.[52] The appellate court observed, however, that the automatic standing rule had been challenged in recent years, but they, like so many other courts had done on this issue, decided that "[u]ntil the Supreme Court rules on this question, we are not prepared to hold that the automatic standing rule of *Jones* has been . . . overruled. . . . That is an issue which the Supreme Court must resolve."[53]

## III. Facts of the Case

Respondents, John Salvucci and Joseph Zackula, were charged in a federal indictment with twelve counts of unlawful possession of stolen mail, a possessory crime. The checks that formed the basis of the indictment had been seized by police during a search conducted pursuant to a warrant, of an apartment rented by Zackula's mother.

Respondents filed a motion to suppress the checks on the

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50. *Id.* at 228 (quoting Simmons v. United States, 390 U.S. at 390). *See* note 11 *supra*.

51. *Id.* at 229.

52. United States v. Salvucci, 599 F.2d 1094 (1979). This decision was based on the then valid automatic standing rule, as the facts of the case were a classical example of a case calling for the application of the rule. *See* text accompanying notes 54 & 55 *infra*.

53. 599 F.2d at 1098. *See* note 54 *supra*. The only explanation for this continued hesitance to decide on the status of the automatic standing rule is judicial prudence. No lower court is willing to overrule a creation of their judicial superiors, and likewise, the Supreme Court is usually reluctant to overrule any of its own prior law. During this period of flux, it appears as though both the *Simmons* rule and the *Jones* rule coexisted and operated in conjunction with one another. In none of the opinions during that time, presented herein, were there expressions of detrimental efforts resulting from this coexistence.

ground that the affidavit supporting the application for the search warrant was inadequate to demonstrate probable cause. The district court granted the motion.[54] The court of appeals affirmed, holding, in reliance on *Jones v. United States* that since respondents were charged with crimes of possession, they were entitled to claim "automatic standing" to challenge the legality of the search without regard to whether they had an expectation of privacy in the premises searched.[55]

## IV. THE COURT'S ANALYSIS

The Supreme Court, in an opinion written by Justice Rehnquist, began its analysis by commending the court of appeals in its observation that while the *Jones* doctrine operated to provide the respondents with automatic standing, its validity had been "challenged in recent years."[56] The Court then labeled the *Jones* rule as "an exception to the general rule,"[57] illustrated by the *Brown* case.[58] The rationale behind the creation of this exception was that "[t]he Court found that the prosecution of such possessory offenses presented a 'special problem' which necessitated the departure from the then-settled principles of Fourth Amendment 'standing.' "[59] Justice Rehnquist proceeded to recite the two-point rationale for the automatic standing rule as given in *Jones*. "First, the Court found that in order to establish standing at a hearing on a motion to suppress, the defendant would often be forced to allege facts . . . which would tend . . . to convict him . . . ,"[60] and secondly, "[w]ithout a rule prohibiting a government challenge to a defendant's 'standing' to invoke the exclusionary rule in a possessory offense prosecution, the government would be allowed the 'advantage of contradictory positions.' "[61]

54. 100 S. Ct. at 2549 n.1.

55. 599 F.2d at 1098. This application of the automatic standing rule was an entirely proper one. The crime charged was possessory in nature and the defendants were attempting to establish standing in a pretrial suppression hearing.

56. 100 S. Ct. at 2550.

57. *Id.*

58. 411 U.S. 223 (1973). The narrowing effect of the *Brown* case on the automatic standing rule shows the Court's dissatisfaction with the rule's operation. Where once the *Jones* rule was the general rule, the Court expressed its frustration by diminishing its validity to the "exception" status, and finally to obsoletion. Once again, the reason is not clear.

59. 100 S. Ct. at 2550, suggesting that the "special problem" no longer exists.

60. *Id.* at 2551 (quoting Jones v. United States, 362 U.S. at 262).

61. *Id.* (quoting Jones v. United States, 362 U.S. at 269). *See* note 12 *supra*.

However, the *Jones* premise and the "two reasons which led the Court to the rule of automatic standing have . . . been affected by time" claimed Justice Rehnquist.[62] This, he explained was largely due to the decision in *Simmons*, where the Court held that "testimony given by a defendant in support of a motion to suppress cannot be admitted as evidence of his guilt at trial."[63] Other developments concerning fourth amendment standing "clarify that a prosecutor may, with legal consistency and legitimacy, assert that a defendant charged with possession of a seized item did not have a privacy interest violated in the course of the search and seizure."[64] These factors convinced the Court that "not only the original tenets of the *Jones* decision have eroded, but also that no alternative principles exist to support retention of the rule."[65] The dismissal of any possible alternative reason for retaining the automatic standing rule was re-emphasized when Rehnquist affirmed that the "dilemma identified in *Jones*, . . . was eliminated by our decision in *Simmons v. United States*."[66]

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62. 100 S. Ct. at 2551.

63. *Id.* As discussed earlier, *Simmons* may or may not have abrogated any necessity for the automatic standing rule. One thing is certain, however, *Simmons* did not provide the protection against subsequent uses of testimony as did the *Jones* rule. It appears as though "time", as suggested by Justice Rehnquist, is not the changing factor at all, rather the *Simmons* decision promulgated any needed change.

64. *Id.* This latest adjustment in the requisite interest for conferring standing is an attempt to eliminate the "vice of prosecutorial self-contradiction." The Court in *Salvucci* relies on a companion case, Rawlings v. Kentucky, 100 S. Ct. 2556 (1980). Since possession both convicted and conferred standing, the Supreme Court eliminated the logical inconsistency by substituting a possessory interest with a new interest requirement. Now a defendant may only assert a fourth amendment claim if he has a *privacy* interest in the area that was searched.

The *Rawlings* Court bases its decision on an earlier Supreme Court case, Rakas v. Illinois, 439 U.S. 128 (1978), where the Court held that when a fourth amendment objection is based on an interest in the property searched, the defendant must show an actual invasion of privacy. No fourth amendment claim based on an interest in the property seized was before the Court. Consequently, the Court could not have logically concluded that a defendant must show a privacy interest in the items seized; and yet they did. As Marshall says in his dissent, "[t]he [*Rawlings*] decision . . . is not supported by the only case directly cited in its favor." 100 S. Ct. at 2566 (Marshall, J., dissenting).

65. 100 S. Ct. at 2551.

66. *Id.* Consider the criminal defendant charged with a possessory crime. As the law now provides, subsequent to *Salvucci*, the only available protection against incriminating use of standing testimony is through the *Simmons* holding. Now that the automatic standing rule is no longer available, he must testify that he had a possessory (perhaps even a privacy) interest in the item seized or the place searched. For our purposes, let us assume that the defendant is, indeed, innocent. Although *Simmons* prohibits the use of this testimony against the defendant directly at trial, the defendant's credibility may be all but destroyed by the prosecution when the defendant attempts to establish his innocence by testifying at trial. There is nothing to prevent the state from impeaching the defendant's testimony. The only safeguard that was ever designed to prevent this inequity was the automatic standing rule.

The Court then addressed itself to a contention made by the respondents. The respondents asserted that the *Jones* dilemma was not entirely abolished by the *Simmons* decision by noting that although *Simmons* "eliminated the possibility that the prosecutor could use a defendant's testimony at a suppression hearing as substantive evidence of guilt at trial, *Simmons* did not eliminate other risks to the defendant which attach to giving testimony at a suppression hearing, [p]rincipally . . . that the prosecutor may still be permitted to use the defendant's testimony to impeach him at trial."[67]

Despite these contentions presented by the respondents, the Supreme Court considered it more appropriate to dismiss the issue for two reasons. First, the Court claimed that it "has not decided whether *Simmons* precludes the use of a defendant's testimony at a suppression hearing to impeach his testimony at trial."[68] In essence, the Court told the defense that their contention was unfounded because the Court had never decided that the use of suppression hearing testimony for impeachment purposes would be permitted. According to the majority's opinion, the impeachment question was not at issue in this case. The second reason given was that the impeachment issue was one which "more aptly relates to the proper breadth of the *Simmons* privilege, and not to the need for retaining automatic standing."[69]

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67. 100 S. Ct. at 2554.

68. *Id.* While this may be technically true, the Supreme Court has indeed acquiesced to such practice by lower courts. *See* note 21 *supra*. Several lower courts have held that suppression hearing testimony is admissible as evidence for impeachment purposes. Perhaps the most significant of these is Woody v. United States, 379 F.2d 130 (D.C. Cir. 1967). It is worth noting that the Supreme Court denied certiorari. 389 U.S. 961 (1967). In *Woody*, Chief Justice Burger, then a member of the Court of Appeals for the District of Columbia, found that in order to promote honesty in trial proceedings, criminal defendants would be held accountable for their prior inconsistent statements. He states that "if an accused testifies in a non-jury hearing to suppress evidence, his testimony at that hearing may be used, at the very least, to impeach later contrary statements." 379 F.2d at 132.

While no one can argue with the premise of Burger's statement, that of promoting honesty in trial proceedings, the situation in fourth amendment standing is not directly analogous. A defendant is *forced* to testify that he *did* possess the item, even though he may not have, just to be able to object to its admissibility at trial. It is not as though he was intentionally deceiving the court, rather, he is merely following the instructions of the court as to the method of obtaining fourth amendment standing. *See* note 74 *infra*.

69. 100 S. Ct. at 2554. It is somewhat perplexing to understand how the Court reached this conclusion. The decision in *Salvucci* directly relates to the issue of impeachment. After all, it was the *Jones* decision, which was overruled by the

Apparently, the Court thought it best to postpone any determination regarding the use of such testimony for impeachment purposes. Any such determination would be reserved for a case which would directly address the breadth of the *Simmons* case. By so deciding, the Court must have believed that the protections provided by *Simmons* were adequate enough to compensate for the absence of the *Jones* automatic standing rule. In other words, it is presumed that the Court would not intentionally leave the criminal defendant without the rights afforded him through the automatic standing rule, unless the Court was certain that *Simmons* had, indeed, eliminated the *Jones* dilemma.

## V. AUTHOR'S ANALYSIS

### *A. The Impeachment Issue*

The respondent's contentions were dismissed after a determination by the Court that any decision regarding the use of suppression hearing testimony for impeachment purposes would be better left to a case that directly addressed the issue. When this opportunity presents itself,[70] the Supreme Court will not be without significant guidelines in making their decision.

Perhaps the clearest of these guidelines is the Court's holding in *Miranda v. Arizona*.[71] Prior to *Miranda*, there appears to have been a distinction drawn between two types of incriminating evidence: actual use of prior testimony and the use of prior testimony for impeachment purposes.[72] *Miranda* ostensibly eliminated any possible distinction between the two:

> No distinction can be drawn between statements which are direct confessions and statements which amount to 'admissions' of part of all of an offense. The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not

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*Salvucci* Court, that provided the only protection against the use of suppression hearing testimony for impeachment purposes.

Here, however, the majority nominates *Simmons* to be the applicable decision to address the impeachment issue. *Simmons* never mentioned impeachment.

70. It seems highly likely that the Court will be presented with such a case before too much time has elapsed, since the automatic standing rule is no longer available. Consequently, criminal defendants will be attempting to establish standing by testifying that they had an interest in the property, and the prosecution will undoubtedly attempt to impeach the defendant's testimony at trial that contradicts his suppression hearing testimony. It is entirely possible that the *Salvucci* case itself will return to the Supreme Court on this very point.

71. 384 U.S. 436 (1966). *Miranda* involved a series of cases that all addressed the issue of the admissibility of certain evidence that may have been obtained in violation of fifth amendment rights.

72. This point is illustrated by the *Simmons* case. The Court felt that actual use of the defendant's testimony given at a suppression hearing was violative of his fifth amendment rights. However, the use of that same testimony for impeachment purposes was neither expressly nor impliedly prohibited by the Court.

> distinguish degrees of incrimination. Similarly, for precisely the same reason, no distinction may be drawn between inculpatory statements and statements alleged to be merely 'exculpatory' . . . [s]tatements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication. *These statements are incriminating in any meaningful sense of the word.* . . .[73]

*Miranda* represents the notion that any defendant's statement, including statements used for purposes of impeachment, must be obtained pursuant to lawful conduct by those obtaining the statements.[74] In *Salvucci*, the Court saw *Simmons* as being adequate protection against the misuse of suppression hearing testimony, and yet the use of such testimony to impeach would be equally as prejudicial against the defendant as would any other use of the testimony. The subsequent use of suppression hearing testimony for purposes of impeachment would certainly be "incriminating in any meaningful sense of the word."[75] *Miranda*, applied in this context by analogy, would serve to abolish any distinction between actual testimony that would incriminate, and the mere use of suppression hearing testimony for purposes of impeachment.

The fact that statements used to impeach may be reliable does not make them any less prejudicial to the defendant. Nor is reliability a ground for permitting the use of such statements to impeach if their use is otherwise improper and prejudicial to the defendant.[76] This is clear from the Supreme Court holding in *Harrison v. United States*.[77] In that case, certain evidence was held to be inadmissible on retrial.[78] When the prosecution then

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73. 384 U.S. at 476-77 (emphasis added). *See* Blair v. United States, 401 F.2d 387 (D.C. Cir. 1968).

74. It could be argued that since suppression hearing testimony is made voluntarily, it is reliable under conventional rules against self-incrimination. *See* Malloy v. Hogan, 378 U.S. 1 (1964). However, as *Simmons* pointed out, "[a] defendant is 'compelled' to testify in support of a motion to suppress only in the sense that if he refrains from testifying he will have to forego a benefit. . . ." 390 U.S. at 393-94.

75. *See* note 79 *infra*.

76. *See* note 80 *infra*.

77. 392 U.S. 219 (1968). In *Harrison*, due to the mistaken conduct of his attorney, the defendant offered testimony that would not otherwise have been required. The Court reversed the defendant's conviction.

78. On retrial, the prosecutor read to the jury the petitioner's previous trial testimony (placing petitioner, shotgun in hand, at the scene of the killing), which was admitted into evidence over petitioner's objection that he had been induced to testify at the prior trial only because of the introduction against him of the inadmissible confessions. Defendant's counsel naturally put the defendant on the stand to rebut the confessions. As might be expected, there was substantial differ-

attempted to use the same evidence for impeachment purposes, the Court frustrated the prosecution's efforts. The reasoning is consistent with *Miranda*; once evidence is declared inadmissible because it was unlawfully obtained, it will also be unavailable for impeachment purposes. While the case was decided on the fruit of the poisonous tree doctrine,[79] it seems obvious that its application should be extended into the context of suppression hearing testimony.

Although *Simmons* never addressed the impeachment issue, its reasoning is evident. The Court found it unconscionable to put a criminal defendant in a position where he was "obliged either to give up what he believed, with advice of counsel, to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination. . . . [W]e find it intolerable that one constitutional right should have to be surrendered in order to assert another."[80]

The logical extension of these cases is clear. *Miranda* identifies the use of unlawfully obtained statements to impeach to be self-incriminating in "any sense of the word."[81] By doing so, it renders invalid any distinction between the use of the statements to establish guilt directly and the use of statements to impeach. *Harrison* prohibits the state from taking advantage of evidence

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ence between the confessions and the retrial testimony. On grant of certiorari, the Supreme Court held that petitioner's testimony in the former trial was inadmissible in the later proceeding because it was the fruit of the illegally procured confession. 392 U.S. at 222-26.

79. *Id.* at 222. The testimony that was held to be inadmissible was given under the mistaken assumption that it was required to rebut the confessions admitted into evidence. The Court viewed the testimony to have been under less than voluntary circumstances, consequently it was inadmissible for *any* and *all* purposes.

The fruit of the poisonous tree doctrine stands for the rule of law that makes any appendage of illegal evidence also illegal. In other words, even if the presentation of certain evidence into court is not illegal *per se*, if it is the product, or the "fruit" of illegally obtained evidence, it is equally inadmissible. *See* 3 W. LAFAVE, SEARCH AND SEIZURE: § 11.4 (1978).

80. 390 U.S. at 394. "The rationale that statements should be excluded from evidence when obtained while the defendant is being encouraged by the state to accept an alternative procedure to his constitutional right of trial receives indirect support in two recent Supreme Court decisions. In Harrison v. United States, [*see* note 77 *supra*] the Court held that when a new trial is granted because illegally obtained confessions were introduced against the defendant, the state cannot subsequently use defendant's testimonial admissions of the first trial. . . . In *Simmons v. United States*, [*see* note 10 *supra*] the Court held that statements made by a defendant during a hearing on an unsuccessful motion to suppress evidence, allegedly seized in violation of the fourth amendment, cannot be used against him at trial. The Court reasoned that a defendant should in *no way* be deterred from seeking his constitutional rights, and it would be grossly unjust if he had to waive his privilege against self-incrimination to obtain them." Bagley, *Improvident Guilty Pleas and Related Statements: Inadmissible Evidence at Later Trial*, 6 CRIM. L. BULL. 3, 18-19 (1970) (emphasis added).

81. *See* note 80 *supra*.

held to be inadmissible. *Simmons* precludes the possibility of surrendering one fundamental right while merely trying to assert another. These Supreme Court holdings dictate a conclusion that evidence, procured either through an illegal search and seizure or under the guise of a suppression hearing, may not be used to establish guilt directly or for impeachment purposes should the defendant decide to take the stand at trial.

This is undoubtedly the conclusion that Justice Marshall would have reached, as is indicated by his dissent in *Salvucci*. He notes that although the Court held in *Brown v. United States* that *Simmons* provided complete protection against the "self-incrimination dilemma . . . [t]he use of testimony for impeachment purpose would subject a defendant to precisely the same dilemma, unless he was prepared to relinquish his constitutional right to testify in his own defense, and would thereby create a strong deterrent to asserting Fourth Amendment claims."[82] The dissenting Justice continues by stating that the majority's decision in *Salvucci* frustrates the very purpose of *Jones* and *Simmons*: the removal of such obstacles to the free exercise of constitutional rights.[83]

### *B. The Tactical Advantage*

A final significant factor that must be considered before any determination can be made concerning impeachment is the tremendous tactical advantage that the present situation provides for the prosecution. The Court noted in *United States v. Havens*,[84] that:

> [a]lthough evidence of prior inconsistent utterances or behavior may ostensibly be offered merely to attack a defendant's credibility by contradicting his trial testimony, such evidence can also serve to buttress the affirmitive elements of the prosecution's case. Thus, almost any time an accused takes the stand, the prosecution will have an opportunity to enhance its case in chief. And it is unrealistic to assume that limiting in-

82. 100 S. Ct. at 2555 (quoting Brown v. United States, 411 U.S. at 228).

83. *Id.*

84. 100 S. Ct. 1912 (1980). The quoted text is a portion of Justice Brennan's dissent to a decision which greatly impaired a defendant's fifth amendment rights. The Court in *Havens* held that where a defendant's statements were made in response to proper cross-examination reasonably suggested by defendant's direct examination, they are subject to otherwise proper impeachment. Justice Brennan characterized this decision as being an "unwarranted departure from prior controlling cases . . . another element in the trend to depreciate the constitutional protections guaranteed the criminally accused." 100 S. Ct. at 1917 (Brennan, J., dissenting).

structions will afford the defendant significant protection.[85]

Justice Marshall also expressed concern that with the removal of the *Jones* protection, "the opportunity for cross-examination at the suppression hearing may enable the prosecutor to elicit incriminating information beyond that offered on direct examination to establish the requisite Fourth Amendment interest."[86] Further, he claims that "[e]ven if such information could not be introduced at the subsequent trial, it might be helpful to the prosecution in developing its case or deciding its trial strategy."[87] Finally, Justice Marshall observes that "[t]he furnishing of such a tactical advantage to the prosecution should not be the price of asserting a Fourth Amendment claim."[88]

*Simmons* truly would have rendered the automatic standing rule obsolete if it were not for the significant tactical opportunities that the use of suppression hearing testimony to impeach offers the prosecution. Because these tactical advantages exist, the abolition of the *Jones* rule puts a criminal defendant in a very inequitable position.

## CONCLUSION

The Supreme Court in *United States v. Salvucci* chose not to decide the impeachment issue, preferring to wait until a case was presented which directly addressed the question. Until such time, it appears that the criminal defendant, charged with a possessory crime, is saddled with the same "dilemma" that the Supreme Court set out to eliminate over twenty years ago.[89] In short, "criminal defendants . . . no longer have the unfettered right to elect whether or not to testify in their own behalf."[90] For if they chose to testify, that testimony will be entirely available to the prosecution for impeachment purposes at trial.

In view of the cases discussed herein, and the fact that such a tremendous advantage is now given to the prosecution, the equitable decision would be one in which the use of suppression hearing testimony for impeachment is prohibited. This result would be consistent with the long-standing philosophy of the Court announced in *Silverthorne Lumber Co. v. United States*:[91] "The essence of a provision forbidding the acquisition of evidence in a

85. *Id.* at 1919 n.2.
86. 100 S. Ct. at 2555.
87. *Id. See* note 91 *infra*.
88. 100 S. Ct. at 2555.
89. The *Jones* decision was decided in 1960.
90. United States v. Havens, 100 S. Ct. 1912, 1917 (1980) (Brennan, J., dissenting).
91. 251 U.S. 385 (1920).

certain way is that not merely evidence as acquired shall not be used before the court, but that *it shall not be used at all*."[92]

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92. 251 U.S. at 392 (emphasis added).